

REMARKS

Claims 1, 3-8, 21-23, 25-30, and 53-54 are currently pending. Claims 1 and 21 have been amended to incorporate the features of dependent claims 2 and 24 respectively. Claims 2 and 24 have been cancelled. No new matter has been introduced by these amendments.

In the only rejection presented in the Office Action, claims 1-8, 21-30, and 53-54 stand rejected under 35 U.S.C. § 103(a) as allegedly being obvious and unpatentable over U.S. Patent Application Publication US2002/0134486 (hereinafter “Brumbelow”). In rejecting these claims, the Examiner contends that the claimed feature of a foam cushion backing having a thickness of greater than 0.075 inches (as set forth in independent Claims 1 and 21) although not taught or even suggested by Brumbelow, is nevertheless an optimum value of a result effective variable, the discovery of which would allegedly have occurred through routine skill in the art. Applicant respectfully disagrees.

In support of the rejection, the Examiner specifically relies upon the holding of *In re Boesch* that discovering an optimum value of a result effective variable only involves routine skill in the art. What the Examiner fails to appreciate however is that discovering an optimum value of an allegedly result effective variable can only be considered *prima facie* obvious if the disputed feature is identified as a result-effective variable. See *In re Antonie*, 559 F.2d 618, 195 U.S.P.Q. 6 (CCPA 1977). That is, the skilled artisan would not attempt to optimize the thickness of a foam cushion layer if the artisan did not first understand that there exists a relationship between the foam cushion thickness and a desired result. Here, the Examiner contends that an increase in the foam thickness would result in an increase in material costs, an increase in resiliency, and/or an increase in absorption properties. For these reasons the Examiner contends foam thickness is known to be a result effective variable. Applicant respectfully disagrees.

First, if an increase in foam thickness results in an increase in material cost as the Examiner suggests, this alone would teach away from providing a foam cushion having a minimum thickness as claimed. Rather, based upon the Examiner’s reasoning, the skilled artisan would seek to reduce the foam thickness in an attempt to reduce material cost.

Second, the Examiner fails to appreciate that foam thickness alone does not result in an increased resiliency or absorption properties as suggested. In fact, several factors other than the thickness of the foam affect the resiliency and absorption properties of a foam cushion backing. For example, the density of a foam cushion can have a significant impact on the absorption and resiliency. Merely increasing thickness as proposed by the Examiner will not necessarily increase density or absorption properties as suggested if the density of the foam is not properly selected or adjusted as well. Similarly, the chemical nature of a foam cushion, such as the specific composition and the degree of crosslinking, if any, can also significantly alter the resiliency and absorption properties of a foam cushion. Once again, merely increasing foam thickness without properly selecting the chemical nature of the foam composition itself will not necessarily result in an increase in resiliency and absorption properties as suggested. Significantly, the cited reference fails to provide guidance on these variables and the Examiner has similarly failed to provide any objective reasoning that would indicate how such factors should be balanced with the foam thickness in an attempt to achieve the increased resiliency and absorption properties as suggested. Thus, for at least this reason, one of ordinary skill in the art would not have been motivated to optimize the thickness of a foam layer to arrive at a thickness greater than 0.075 inches as set forth in the claims.

Notwithstanding the patentability of the foam thickness feature addressed above, independent claims 1 and 21 have also been amended to further recite that the foam cushion is substantially uncrosslinked. To that end, in the previous Office Action mailed December 12, 2007, the Examiner recognized that Brumbelow was silent with respect to the degree of crosslinking present. In view of this silence, the Examiner nonetheless concluded that the composition of Brumbelow was presumed to be substantially uncrosslinked and therefore obvious. Applicant respectfully disagrees.

A prior art reference's silence on a given feature is not proper support for a determination or presumption that said feature exists or would otherwise be obvious. At best, the Examiner's conclusion that the foam cushion backing of Brumbelow is uncrosslinked is based upon a theory of inherency. However, it is well settled that inherency requires a showing by the Examiner that the missing feature must necessarily

exist. Here, the Examiner has not provided any objective reasoning as to why the foam cushion of Brumbelow is necessarily substantially uncrosslinked. Moreover, in the absence of this showing, the Examiner has also failed to provide any objective reasoning why Brumbelow's silence as to the degree of crosslinking in a foam cushion would motivate one of ordinary skill in the art to provide a substantially uncrosslinked foam cushion as set forth in applicant's claims. Accordingly, for at least this reason, the Examiner has failed to establish a *prima facie* showing that the claimed feature of a substantially uncrosslinked foam cushion is obviousness. Applicant therefore respectfully requests that the rejection of claims 1, 3-8, 21-23, 25-30, and 53-54 be withdrawn.

CONCLUSION

In view of the foregoing Amendments and Remarks, it is respectfully asserted that the rejections set forth in the Office Action of July 18, 2008 have been overcome and that the application is in condition for allowance. Therefore, Applicant respectfully seeks notification of same.

Respectfully submitted,

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